FILE COPY

No. _____

Supreme Court, U. S.
FILED
DEC 2 1972
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

72-807

JOHN E. ROMEO and BEVERLY C. ROMEO,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
THE SMALL BUSINESS ADMINISTRATION,
and the HONORABLE HILARY SANDOVAL, JR.,
ADMINISTRATOR OF THE SMALL
BUSINESS ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GERALD BLESSEY
ATTORNEY FOR PETITIONERS
SEKUL, HORNSBY, WALLACE,
and BLESSEY
419 West Howard Avenue
Biloxi, Mississippi 39530

PETER HALAT, JR.
OF COUNSEL
Barq Building
Biloxi, Mississippi 39530

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

JOHN E. ROMEO and BEVERLY C. ROMEO,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
THE SMALL BUSINESS ADMINISTRATION,
and the HONORABLE HILARY SANDOVAL, JR.,
ADMINISTRATOR OF THE SMALL
BUSINESS ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GERALD BLESSEY
ATTORNEY FOR PETITIONERS
SEKUL, HORNSBY, WALLACE,
and BLESSEY
419 West Howard Avenue
Biloxi, Mississippi 39530

PETER HALAT, JR.
OF COUNSEL
Barq Building
Biloxi, Mississippi 39530

Page

Petition for a Writ of Certiorari.... 1

Opinions of District and Appellate Courts..... 2

Jurisdiction..... 3

Questions Presented..... 4

Laws Involved..... 5

Statement of the Case..... 8

Argument..... 14

Question One..... 14

A. Money Damages..... 14

B. Mandamus for Specific Performance..... 18

Question Two..... 24

Conclusion..... 26

Appendix A--Opinion of the United States Court of Appeals, Fifth Circuit (July 7, 1972), following page 27..... A1

Appendix B--Original Opinion of the United States District Court, Southern District of Mississippi, Southern Division (May 13, 1971)... A7

Page

Appendix B--Supplemental Opinion of the United States District Court, Southern District of Mississippi, Southern Division (September 29, 1971)..... A16

TABLE OF CASES

Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U. S. 388, 91 S. Ct. 1999 (1971)..... 24,25

Dugan v. Rank, 372 U. S. 609, 83 S. Ct. 999 (1963)..... 18,19,20

Jones v. Freeman, 400 F. 2d 383..... 20

Simpkins v. Davidson, 302 F. Supp. 456 (S.D.N.Y. 1967)..... 23

U. S. v. Mel's Lockers, Inc., 346 F. 2d 168 (C.A. 10, 1965)..... 21,22

von Lusch v. Hoffmaster, 253 F. Supp. 633 (D. Md. 1966)..... 23

STATUTES

	Page
U. S. Constitution, Amendment V	5,9,20
5 U.S.C. 702	6,8,18
5 U.S.C. 706	6,18,20,23
11 U.S.C. 714	22
15 U.S.C. 631-647	18,19,20
15 U.S.C. 634 (b) (1)	5,8,22,23
28 U.S.C. 1254	3
28 U.S.C. 1331	8
28 U.S.C. 1361	7,8
28 U.S.C. 2101 (c)	3

JOURNALS

"What's New in the Law," 58 A.B.A.J. 1104 (1972) 3,15

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1972

JOHN E. ROMEO and BEVERLY C. ROMEO, Petitioners,	
vs.	
THE UNITED STATES OF AMERICA, THE SMALL BUSINESS ADMINISTRATION, and THE HONORABLE HILARY SANDOVAL, JR., ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION, Respondents,	No.------

---

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioners, John E. Romeo and wife, Beverly C. Romeo, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit affirming the decision of the District Court for the Southern District of Mississippi, Southern

Division, sustaining all Defendants' (Respondents') motion to dismiss on jurisdictional grounds.

OPINIONS OF DISTRICT AND APPELLATE COURTS

Prior to any evidentiary hearing or trial, the District Court filed an Opinion (unreported) dated May 13, 1971, sustaining in part and overruling in part the defendants' motion to dismiss. On September 29, 1971, the District Court entered a supplemental opinion (unreported) sustaining in total the defendants' motion to dismiss, and an implementing order was entered on October 7, 1971.

On appeal to the Circuit Court of Appeals for the Fift Circuit, the District Court's decision was affirmed in an opinion reported at 462 F. 2d 1036, dated July 7, 1972, which has also been reported in "What's

New in the Law," 58 A.B.A.J. 1104 (1972).

The opinions of the District Court and of the Circuit Court are printed in the appendix to this petition.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals sought to be reviewed was entered on July 7, 1972.

No rehearing was sought, but on October 4, 1972, Justice Lewis F. Powell, Jr., extended the time within which to petition for certiorari until December 4, 1972, "without prejudice to the Court's consideration of whether this application has been filed in time."

Jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254 (1) and 28 U.S.C. 2101 (c).

QUESTIONS PRESENTED

1. May the Administrator of the Small Business Administration (hereinafter called SBA) refuse to disburse a previously authorized disaster loan, to the financial detriment of the borrower, without stating the reasons for refusal and without a hearing or opportunity for the borrower to rebut evidence influencing the Administrator's decision, even where the refusal was based on an arbitrary and capricious discrimination against the borrower?

2. Does the United States District Court have jurisdiction to grant relief for a claim exceeding $10,000.00 against the Administrator of the SBA in his personal capacity for allegedly violating the rights of the Plaintiffs under the United States Constitution, Amendment V?

LAWS INVOLVED

U. S. Constitution, Amend. V, provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U.S.C. 634 (b) (1) provides:

> (b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may--
>
> (1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversies without regard to the amount in controversy; but no attachment,

injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property.

5 U.S.C. 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 U.S.C. 706 provides:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. 1361 provides:

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

STATEMENT OF THE CASE

The basis for jurisdiction of this case by the District Court is 28 U.S.C. 1331, 28 U.S.C. 1361, 15 U.S.C. 634 (b) (1), and 5 U.S.C. 702.

John E. and Beverly C. Romeo, residents of Biloxi, Mississippi, husband and wife, filed their action against the Defendants to require specific performance of a disaster loan contract between the Romeos and the SBA and for damages for its breach.

Defendants in their answer and in their Motion to Dismiss alleged (in summary) that the Complaint failed to state a claim upon which relief could be granted, that no injunctive relief is available against any defendant, that the damages sought exceed the limit of the Tucker Act, and that all the Defendants, including the Honorable Hilary Sandoval in

his personal capacity, are immune from suit by virtue of the doctrine of sovereign immunity. However, the Defendants admitted the authenticity of all Exhibits attached to the Complaint.

The District Court overruled Mr. and Mrs. Romeo's Motion for Summary Judgment and to Strike the Answer, and then, without an evidentiary hearing, sustained the Defendants' Motion to Dismiss. In a memorandum, which is not a part of the record, as well as on oral argument on the Motion for Summary Judgment and in their brief on appeal, counsel for Mr. and Mrs. Romeo submitted that the acts of the Administrator of the SBA in refusing to disburse a loan already authorized were acts repugnant to the United States Constitution, Amendment V, the "due process" clause.

The facts as alleged in the Complaint and in the affidavits supporting the Romeos' Motion for Summary Judgment are briefly set forth. On September 25, 1969, following the destruction by Hurricane Camille of the Petitioners' business in Biloxi, known as the Can-Can Club, the Romeos applied to the SBA for a loan in the amount of $57,000.00. (R. pp 6-16).

On November 25, 1969, the Romeos were advised by letter from the SBA Disaster Branch Office Manager that the loan requested had been approved in the amount of $41,500.00.

> . . . subject to the terms and conditions in enclosed Authorization . . . . If you are in immediate need of funds, we suggest you take this letter to your Bank of account who may be able to advance funds to let you get your rehabilitation started. (R. p 17.)

Attached to this letter was an SBA

authorization (R. pp 18-20). The Defendants admitted the authenticity of this letter and authorization (R. p 25).

Relying on these documents, the Romeos borrowed $2,500.00 from a bank and began to hire contractors for the reestablishment of their business (R. p 39).

On April 1, 1970, the Petitioners were advised by letter from Mr. George A. Fields, the Regional Director of the SBA:

> Information supplied by other government agencies has resulted in our decision that it would not be in the best interest of the SBA as an agency of the Federal Government to lend government funds to the Mermaid Club.
>
> (R. p 21.)

No other reasons were given.

By additional affidavit in support of his Motion for Summary Judgment, the Petitioner, John Romeo, attached a copy of a letter dated October 9, 1970,

addressed to him from the Administrator of the SBA at that time, the Honorable Hilary Sandoval, who again refused to disburse the funds previously authorized by the SBA, without really explaining the reasons for the refusal to disburse the loan proceeds and without giving Mr. and Mrs. Romeo a hearing or any other opportunity to challenge the information provided to the SBA which motivated the change in the position of the SBA toward the Romeos' loan. (R. pp 37-39.)

Also in support of the Motion for Summary Judgment, the Petitioners submitted an affidavit from Mr. Anthony M. Mazara stating that Mr. Mazara had been investigated by agents of the Federal Government for alleged gambling, had obtained a Federal Gaming License, and after Hurricane Camille had obtained an

SBA loan for $23,000.00, all of these conditions being similar to Mr. Romeo's.

The first Opinion of the District Court dismissed all of the Complaint except for the issue:

> ...whether plaintiff is entitled to monetary damages as a result of a wrongful act by the Administrator outside his delegated authority and which has deprived plaintiffs of a legal right. (Appendix A15 herein)

However, in its Supplemental Opinion (Appendix A16), the District Court also dismissed the action for damages against the Administrator.

On appeal, the Fifth Circuit overruled the District Court's holding that sovereign immunity is a bar to action for damages against the Defendants (Appendix A3 herein). However, the Fifth Circuit was obviously confused about the state of the evidence because it affirmed the

dismissal of the action for damages "on the merits." (Appendix A4). The Fifth Circuit decision also affirmed the lower court's holding that sovereign immunity is a bar to specific performance in this case and to an action for damages against the Administrator of the SBA in his personal capacity.

No evidence at all was offered by the SBA in the District Court to show that the Petitioners, Mr. and Mrs. Romeo, were engaged in gambling at the time of Hurricane Camille or at the time of their application for this disaster loan.

ARGUMENT

Question One

A. Money Damages

The issues raised in question one have not been decided by the Supreme Court. The importance of the issues is under-

scored by the fact that this case was reported in "What's New in the Law," 58 A.B.A.J. 1104 (1972).

Carelessly departing from usual procedure, the Circuit Court denied the Romeo's claim for money damages "on the merits," (Appendix A4) even though no evidentiary hearing or trial was held. In fact, the Fifth Circuit's Opinion discloses confusion as to what happened in the District Court--for instance, the Fifth Circuit stated, "At trial, and on this appeal, the defendants contended ...." (App. A3) But there was no trial. Again, the Fifth Circuit stated, "The district court found...." (App. A5) But there were no findings of fact by the District Court--the case was dismissed on jurisdictional grounds.

Having recognized that sovereign immunity has been waived in actions for

damages against the SBA (App. A4), the Fifth Circuit should have remanded the case for a trial on the merits. Apparently, the Fifth Circuit thought a trial had already taken place.

The Petitioners made a prima facie case for breach of contract by the Administrator of the SBA: The Petitioners applied for a loan (R. pp 6-16); the SBA accepted the application and sent an authorization of the loan to Mr. and Mrs. Romeo (R. pp 17-20); Mr. and Mrs. Romeo relied on the authorization to obtain advances from their local bank (R. p 39); the SBA, through its Administrator, refused to disburse the loan giving no reasons for the withdrawal (R. p 21), and Mr. and Mrs. Romeo were damaged by this refusal to disburse the loan proceeds.

Neither the Administrator of the SBA nor any of the Defendants have pled or

argued any lawful reason for this rescission of the loan agreement.

In fact, no explanation for the refusal to disburse the loan was given in the April 1 letter of withdrawal (R. 21), but five months later, Mr. Sandoval sent a cryptic letter stating to Mr. Romeo that the reasons should be "abundantly clear to you." (R. p 37-38) Apparently, a suspicion of involvement with gambling caused Mr. Sandoval to exercise his "discretion." But Mr. Romeo was not involved with gambling any time proximate to the time of application. (R. p 29) Loans have been granted to other borrowers who have previously held federal wagering tax stamps. (R. 41)

There was no finding that suspicion of prior involvement in gambling triggered one of the conditions of the loan authorization, as suggested by the Fifth

Circuit. (App. A4-5)

Surely, under 5 U.S.C. 702 & 706, the Petitioners should be allowed an opportunity at a trial on the merits to produce evidence showing that the action of the Administrator was an arbitrary and capricious abuse of discretion outside the scope of power granted in the Small Business Act, 15 U.S.C. 631-647.

B. Mandamus for Specific Performance

Both the district court and the Fifth Circuit Court invoked sovereign immunity to bar the action for mandamus to disburse the loan. In this holding, they are in conflict with prior decisions of the Supreme Court.

The district court cited the general rule in the leading case of Dugan v. Rank 372 U. S. 609, 83 S. Ct. 999 (1963), but the district and circuit court opinions

ignored the exceptions to this rule which the Dugan case itself expresses:

> These exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void.
>
> Dugan V. Rank, 372 U. S. 609, 621; 83 S. Ct. 999, 1007 (1963).

The Petitioners submit that the Administrator's refusal to disburse funds of an authorized loan after the borrower had relied to his detriment, is action beyond the statutory powers granted by the Small Business Act, 15 U.S.C. 631-647; and that, even if the refusal to disburse the loan is within the scope of the Defendants' statutory authority, nevertheless, the manner in which it was carried out is constitutionally void, because the said refusal was arbitrary and capricious, was made without notice,

hearing, appeal, or recourse, and was damaging to the Plaintiffs, which action constituted a denial of Constitutional due process. U. S. Const., Amend. V.

Thus, the Petitioners fall within one or both exceptions to sovereign immunity as previously described by the Supreme Court.

However, whether the Dugan exceptions apply or not, Congress has given the district courts authority to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C.A. 706 (1). Judicial review under a statute authorizing agency action is not precluded because some of that action may be committed to agency discretion by law. Jones v. Freeman, 400 F. 2d 383. Mr. and Mrs. Romec contend that the Small Business Act, 15 U.S.C. 631-647, does not give the agency or its officials

discretion to withdraw a loan, once authorized, unless the borrower fails to comply with the conditions of the authorization. Neither the Administrator of the SBA, nor any other representative of the SBA or the United States of America have contended that Mr. and Mrs. Romeo failed to comply with any of the conditions of the authorization.

The Defendants mistakenly characterize the Petitioners' cause of action for specific performance as an action seeking to compel the Defendants to make a loan. This is not the Petitioners' case. The loan was authorized, and Mr. and Mrs. Romeo seek to compel the disbursement of the loan proceeds.

The District and Circuit Courts also relied on U. S. v. Mel's Lockers, Inc., 346 F. 2d 168 (C.A. 10, 1965) in support of their holding that the Small Business

Administration is immune from injunctive relief. However, the Mel's Lockers case involved a bankruptcy proceeding in which the SBA moved to dissolve the order of the referee enjoining it from continuing a foreclosure proceeding. The Court held that the Bankruptcy Act, Section 314, 11 U.S.C. 714, did not intend to waive the immunity of the SBA from injunction as stated in the Small Business Act, 15 U.S.C. 634 (b). Therefore, the Mel's Lockers case turned on a question of which federal statute would govern, or in a more basic sense, which federal policy would prevail. Also, the injunction sought in the Mel's Lockers case would have prevented the SBA from executing a major aspect of the SBA program. In the Romeos' case, however, they seek not to prevent but to compel the lawful exercise of the SBA program.

Whether 15 U.S.C.A. 634 (b) or 5 U.S.C.A. 706 (1) will control as to the availability of mandamus relief is a question of statutory interpretation, which neither the District Court nor the Fifth Circuit considered.

The district court relied on von Lusch v. Hoffmaster, 253 F. Supp. 633 (D. Md. 1966), in support of its holding that the SBA is not a suable agency, but Mr. and Mrs. Romeo submit that the von Lusch case pertained to matters within the SBA's discretion to be exercised prior to authorizing a loan. In the Romeos' case, they do not ask the Court to draft the terms and conditions of the SBA's loan agreement but seek only the disbursement of a loan already authorized. Likewise, in Simpkins v. Davidson, 302 F. Supp. 456 (S.D.N.Y. 1967), the plaintiffs therein sought to have the Court define

the terms and conditions for making a loan, which the Court held would invade the SBA's discretion granted by Congress; but the Court also held that, if at a trial it was shown that the application was not even considered by the SBA, then a mandamus compelling acceptance of the application was within the jurisdiction of the Court.

The Supreme Court should pass on this important question--whether mandamus relief is available against the Administrator of the SBA.

Question Two

The Fifth Circuit and the district court completely ignored the Supreme Court's most recent decision permitting a suit for damages against federal officials--see the recent case of Bivens v. Six Unknown Agents of the Federal

Bureau of Narcotics, 403 U. S. 388, 91 S. Ct. 1999, where it is stated:

> The question...is whether the petitioner, if he can demonstrate an injury consequent upon the violation by federal agents of his Fourth Amendment rights, is entitled to redress his injury through a particular remedial mechanism normally available in the federal courts.

The Supreme Court held therein that a remedy in the form of money damages should be permitted and that no specific legislation is needed.

Mr. and Mrs. Romeo believe that upon a trial of the facts of their case it will become evident that Mr. Sandoval personally violated their rights by exceeding his statutory authority and by denying them constitutional due process through his arbitrary and capriciously discriminatory refusal to disburse the proceeds of the Romeos' loan without giving any reasons or justification at

the time of the refusal.

CONCLUSION

It is extremely important to the small businessman that the Supreme Court clarify whether sovereign immunity will shield arbitrary and capricious bureaucrats from justice.

It is even more important that the Supreme Court not allow the District Court of the Southern District of Mississippi and the Fifth Circuit Court of Appeals to find facts about agency decisions without any evidentiary hearings or trial.

Sovereign immunity says, "The king can do no wrong." But, in our nation, the law is king, or should be.

Respectfully submitted,

GERALD BLESSEY
Attorney for Petitioners

PETER HALAT, JR.
Of Counsel

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3401

JOHN E. ROMEO and BEVERLY C. ROMEO,
Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA,
THE SMALL BUSINESS ADMINISTRATION,
and HON. HILLORY SANDOVAL, ADMINISTRATOR
of the SMALL BUSINESS ADMINISTRATION,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

---

(July 7, 1972)

Before RIVES, COLEMAN and DYER,
Circuit Judges.

RIVES, Circuit Judge: Following destruction visited upon his place of business by Hurricane Camille, Romeo made application to the Small Business Administration ("SBA") for a disaster loan. That loan

in the amount of $41,500 was approved on November 4, 1969. In its letter to Romeo, the SBA stated: "If you are in immediate need of funds, we suggest you take this letter to your Bank of account who may be able to advance funds to let you get your rehabilitation started." Following the SBA's suggestion, Romeo sought and received a $2,500 advance from a local bank. Then, on April 2, 1970, the SBA notified Romeo that the loan approval had been rescinded. In a letter dated October 9, 1970, the SBA expounded upon its reasons for withdrawal of the loan:

> "We have reviewed our files regarding your application and they indicate that you have been interviewed by Federal agents several times in recent years regarding possible illegal activities in connection with some of your business enterprises. Also, in recent years you obtained and used a Federal wagering tax stamp."

(App. at 37.)[1]

Romeo filed this suit, against the United States, the SBA, and its Administrator, in federal district court, asserting jurisdiction under 42 U.S.C. § 1331 and 15 U.S.C. § 634(b)(1).[2] Romeo prayed for monetary dam-

---

[1]Romeo originally sought funding to reconstruct the Mermaid Club. The SBA discovered that the Mermaid Club had been operated, at least in part, as a gambling establishment. Romeo sought to explain that his initial application was in error, that he was actually seeking funds to rebuild the Can Can Club, in which no gambling would be allowed.

[2]15 U.S.C. § 634(b) provides:

"(b) In the performance of, and with respect to, the functions, powers, and duties vested in him by this chapter the Administrator may —

ages in excess of $10,000 and for specific performance of the November 1969 loan approval. The district court dismissed Romeo's suit with prejudice. We affirm.

Romeo's cause of action is two-pronged. Initially he seeks recovery from the United States, the SBA, and its Administrator, Hillory Sandoval, in his official capacity. Alternatively, Romeo lodges a claim against the Administrator in his individual and personal capacity.

(1) At trial, and on this appeal, defendants contended that the doctrine of sovereign immunity bars Romeo's claim against the United States, the SBA, and Hillory Sandoval in his official capacity. That is, being an integral part of the United States Government, the SBA and its Administrator are cloaked with full immunity. As a starting proposition, defendants' contention is sound. *United States v. Mel's Lockers, Inc.*, 10 Cir. 1965, 346 F.2d 168; *see also Larson v. Domestic and Foreign Commerce Corp.*, 1949, 337 U.S. 682; *Simpkins v. Davidson*, S.D.N.Y. 1969, 302 F. Supp. 456. Equally valid is the notion that the sovereign can, by an Act of Congress, waive its immunity. *E.g., Dalehite v. United States*, 1954, 346 U.S. 15; *United States v. Shaw*, 1940, 309 U.S. 495. We hold that Congress has, to some extent, waived immunity for the SBA by enacting 15 U.S.C. § 634(b)(1), quoted in footnote 2, *supra*. To give that

---

"(1) sue and be sued in any court of record of a State having general jurisdiction, or in any United States district court, and jurisdiction is conferred upon such district court to determine such controversy; but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property * * *."

section any substantial meaning, we conclude that it was intended to waive sovereign immunity with respect to the functions, powers, and duties of the Administrator.[3] However, the waiver is a limited one, for "no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Administrator or his property." *Id.* Clearly, then, Romeo's suit is barred insofar as he seeks injunctive relief in the nature of specific performance.[4] But the Congress has consented to his claim for monetary damages.[5]

On the merits, Romeo's claim for money damages fails. Paragraph 14 of the SBA's loan authorization, issued to Romeo on November 4, 1969, provides:

> "Prior to the first disbursement, and to each subsequent disbursement on account of the Loan, Disaster Office Branch Manager shall be in receipt of evidence, satisfactory to him in his sole discretion, that there has been no adverse change since the date of the Application, or since any of the preceding disbursement, or that since the date of such Application or of any such disbursement, no facts or circumstances have become known or have arisen

---

[3]The Administrator is vested with complete control and supervision over the affairs of the SBA: "The management of the Administration shall be vested in an Administrator ***." 15 U.S.C. § 633(b)

[4]Mel's Lockers, Inc., *supra; see* Allen M. Campbell Co. v. Lloyd Wood Construction Co., 5 Cir. 1971, 446 F.2d 261.

[5]SCLC v. Connolly, E.D. Mich. 1971, 331 F. Supp. 940; Pottharst v. SBA; E.D. La. 1971, 329 F.Supp. 1142; Simpkins v. Davidson, S.D. N.Y. 1969, 302 F. Supp. 456. *See also,* Allen M. Campbell Co. v. Lloyd Wood Construction Co., N.D. Ala. 1970, 318 F. Supp. 1167, *rev'd on other grounds,* 446 F.2d 261.

> with respect to the organization, operations, business prospects, fixed or other property, personnel, or in the financial or any other condition of Borrower, which would warrant withholding or not making any such disbursement or any further disbursement."

(App. at 20.) Subsequent to its approval of Romeo's application, the SBA became aware of his involvement with gambling activities. The district court found that it was within Sandoval's discretion, pursuant to SBA policy, to deny a loan to an individual involved with gambling. Romeo does not deny that he had a federal wagering tax stamp or that he had been investigated for illegal gambling enterprises. He does contend that his gambling activities were limited to the Mermaid Club, that he intended to utilize any SBA funds to reconstruct the Can Can Club, and that no gambling was to be carried on in that establishment. Nonetheless, we are persuaded that the district court was on sound ground in approving the Administrator's discretionary act. Sandoval could legitimately withhold funds from one such as Romeo, who was undoubtedly to some extent involved in gambling.[6]

(2) Having concluded that Sandoval acted within the scope of his legitimate authority in withholding the loan, we also affirm the district court's judgment denying any recovery against the Administrator in his personal capacity. As the district judge noted:

---

[6]Moreover, as noted in footnote 1, *supra*, Romeo's loan application sought funding for the Mermaid Club. Apparently, he did not seek to inform the SBA that he wanted the funds for the Can Can Club until after he became aware of the SBA's interest in his alleged gambling activities.

> "'* * * federal officials cannot be held personally liable in damages for an act committed within the general scope of their official authority and in performance of their official duties.' [Quoting from *Norton v. McShane*, 5 Cir. 1964, 332 F.2d 855.] The principal reason as stated in *Barr v. Mateo*, 360 U.S. 564, is that government officials must be free to exercise their duties without fear of damage suits in respect to acts done in the course of those duties. Even in a case where plaintiffs charged federal officials with the unlawful, willful and malicious denial of fundamental constitutional rights, the Fifth Circuit Court of Appeals denied liability. See *Norton v. McShane* (supra). In *Norton*, the court said: 'The federal courts have applied the doctrine of official immunity to suits against numerous officials for many different torts. By the great weight of authority, law enforcement officers are immune from civil suits based on allegedly malicious acts.' * * * [B]owing to the * * * rule stated above, the Court finds that the Administrator's decision * * * was within at least 'the outer perimeter' of his official duties and he is therefore immune from liability."

(App. at 49.) We are in accord with that view and can perceive no reason, under the circumstances of this case, for departing from the general rule.

AFFIRMED.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JOHN E. ROMEO, ET UX, Plaintiffs	)	
vs.	)	Civil Action No. 4072
U.S.A., SMALL BUSINESS ADMINISTRATION, and HILARY SANDOVAL, ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION, Defendants	)	May 13 1971

OPINION OF THE COURT

Plaintiffs, residents of Biloxi, Mississippi, filed their action against the above named defendants to require specific performance of an alleged contract between plaintiffs and SBA, and, alternatively, damages for its breach. Jurisdiction was predicated on 28 U.S.C. A. #1331. Defendants, in their answer, allege that the complaint fails to state

a claim upon which relief can be granted, that the Court lacks jurisdiction over the subject matter, that the action is an un-consented suit against the U.S.A., and otherwise generally denies the allegations.

At a hearing on a number of pending motions, the Court overruled plaintiffs' motions for summary judgment and to strike the answer, and reserved ruling on defendants' motion to dismiss, pending the submission of briefs, which motion is now before the Court. Discovery procedures, initiated by plaintiffs, have been suspended pending the Court's ruling on the motion to dismiss.

In its motion to dismiss, defendants set forth eight grounds which boil down to defenses that SBA is not a suable agency; that, as an agency of the U.S.A., sovereign immunity applies to both the

U.S.A. and SBA; that no injunctive relief is available against any defendant; that as to damages, the amount sought exceeds the jurisdictional limit of the Tucker Act; and that the decision of the Administrator with regard to a loan is a matter statutorily committed to agency discretion, and therefore not reviewable by the Court.

The facts as claimed in the bill of complaint are briefly set forth. On September 25, 1969, following the destruction by Hurricane Camille of plaintiffs' business in Biloxi known as the Can Can Club, plaintiffs, doing business as Mermaid Club, applied to SBA for a loan in the amount of $57,000.00. On November 25, 1969, plaintiffs were advised by letter from the SBA Disaster Branch Office Manager of SBA that the loan requested had been approved in the

amount of $41,500.00, "subject to the terms and conditions in enclosed authorization." The letter further stated: "If you are in immediate need of funds, we suggest you take this letter to your bank of account who may be able to advance funds to let you get your rehabilitation started." Attached to this letter was an SBA "Authorization." Copies of the letter and Authorization are attached to the complaint. Relying on these documents, plaintiffs borrowed $2,500.00 from a bank and began to hire contractors for the re-establishment of their business. On April 2, 1970, plaintiffs were advised by letter from the Regional Director of SBA: "Information Supplied by other Government Agencies has resulted in our decision that it would not be in the best interest of the Small Business Administration as an

Agency of the Federal Government to lend Government funds to the Mermaid lub." Several months after the filing f the complaint, and in support of the r motion for summary, filed January 11, 1971, plaintiff Romeo submitted a affidavit saying that he responde to the Field Director's letter, advising him that the application on behalf of the Mermaid Club was in error as it ad been previously destroyed by Hurricane Betsy in 1965, and that the application was intended to be in behalf of his operation known as the Can Can Club, at a different location with a different operation (no gambling), and different policies from that of the Mermaid Club. By an additional affidavit filed March 23, 1971, Romeo attached a copy of a letter dated October 9, 1970, addressed to him from Hilary Sandoval, Jr., Administrator of

SBA, again declining a loan. Sandoval said that regulations provide that the Administration may look to an applicant's activities in order to determine whether he is eligible for financial assistance and that no one has a legal right to a loan.

The Court agrees with respondents that sovereign immunity is a bar to any injunctive relief against the U.S.A. or SBA. See Larson v. Domestic and Foreign Commerce Corp., 337 U. S. 682. SBA is not a suable agency. Simpkins v. Davidson, 302 F. Supp. 456; von Lusch v. Hoffmaster, 253 F. Supp. 633; and U. S. v. Mel's Lockers, Inc., 246 F. 2d 168. As to monetary damages against the U.S.A. plaintiff has made no claim under the Tucker Act which expressly limits claims to under $10,000.00 nor does this seem to

be a Tucker Act case. Knight Newspapers, Inc. v. U. S., 395 F. 2d 353.

When stripped to what is left, plaintiffs' action depends upon whether they are entitled to a judicial review of an agency action whereby they claim to have been wronged. Judicial reviews of agency actions are provided for pursuant to Title 5, U.S.C.A., Section 701, et seq., except where statutes preclude judicial review, or agency action is committed to agency discretion.

Section 634, Title 15 U.S.C.A. specifically authorizes suits against the Administrator of SBA without regard to the amount in controversy, but specifically excludes injunctive relief against the Administrator.

The issue, as the Court sees it, is whether or not the action complained of here is one committed to agency

discretion, not reviewable by this Court, or whether the Court may review the action under the scope permitted under Section 706 (2), Title 5 U.S.C.A.

Under additional powers granted to SBA as set out in Title 15, Section 636 (a) (7), the authorizing of loans appears to be discretionary. The Court, however, is not satisfied, at this point in the proceedings, that the authorization, once given, could be rescinded at the discretion of the Administrator, or the loan denied under regulations which are not before this Court. See Federal Power Commission v. United Gas Pipe Line Co., 393 U. S. 71.

Accordingly, the Court grants all that part of the motion to dismiss as to the U.S.A. and SBA, and as to the Administrator in so far as mandatory or injunctive relief is sought, leaving as the

sole issue whether plaintiff is entitled to monetary damages as the result of a wrongful act by the Administrator outside his delegated authority and which has deprived plaintiffs of a legal right.

An appropriate order may be submitted.

/s/Dan M. Russell, Jr.
United States District Judge

Dated: May 13, 1971

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

JOHN E. ROMEO, ET UX, Plaintiffs	
vs.	Civil Action
U.S.A., SMALL BUSINESS ADMINISTRATION, and HILARY SANDOVAL, ADMINISTRATOR OF THE SMALL BUSINESS ADMINISTRATION, Defendants	No. 4072
	September 29 1971

SUPPLEMENTAL OPINION

On May 13, 1971, this Court issued its opinion sustaining the government's motion to dismiss as to all defendants in the above styled case except as to the Administrator, reserving ruling on the motion as to him on the grounds that the Court was not satisfied that the Authorization, once given, could be rescinded at the discretion of the Administrator or

the loan denied under agency regulations which were not before the Court. Prior to the entry of judgment, the government renewed its motion to dismiss as to the Administrator. An opportunity having been given to plaintiff to respond to the government's request, and the matter having been re-considered by the Court, the Court is now satisfied that the action cannot be maintained against the Administrator in either his official capacity or against him personally.

Plaintiff seeks specific performance or, alternately, damages in excess of $10,000.00 for a breach of contract. The Court in its original opinion found that no injunctive relief could be had against any defendant, and, as the monetary relief exceeds the minimum permitted under the Tucker Act, the suit must fail as to the United States of America. The Court

also found that the doctrine of sovereign immunity defeats a suit against the Administrator in his official capacity. Chief Judge John R. Brown of the Fifth Circuit, in Gardner v. Harris, 391 F. 2d 885, cited the accepted holding in Dugan v. Rank, 372 U. S. 609, as:

> The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,...or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act.'

While this Court was concerned with whether or not the Administrator's actions in connection with the denial of plaintiff's loan should be subject to judicial scrutiny, the rulings in Scherer v. Brennan, 379 F. 2d 609, and Norton v. McShane, 332 F. 2d 855, establish "that federal officials cannot be held

personally liable in damages for an act committed within the general scope of their official authority and in performance of their o-ficial duties." The principal reason as stated in Barr v. Mateo, 360 U. S. 564, is that government officials must be free to exercise their duties without fear of damage suits in respect to acts done in the course of those duties. Even in a case where plaintiffs charged federal officials with the unlawful, willful and malicious denial of fundamental constitutional rights, the Fifth Circuit Court of Appeals denied liability. See Norton v. McShane (supra). In Norton, the court said: "The federal courts have applied the doctrine of official immunity to suits against numerous officials for many different torts. By the great weight of authority, law enforcement officers are

immune from civil suits based on allegedly malicious acts." Also in Norton, plaintiffs were criticized for not responding with counter-affidavits to defendants' motion to dismiss supported by an affidavit. The district court, treating the motions to dismiss as motions for summary, also held that all defendants were acting within the scope of their authority and were immune from liability. A majority of the Appellate Court affirmed. In the case sub judice, and unlike, as in Norton, plaintiff has responded to the motion to dismiss with counter-affidavits and other supporting documents indicating that plaintiffs may have been discriminatorily treated in the Administrator's refusal of his loan. Nonetheless, bowing to the majority rule stated above, the Court finds that the Administrator's decision, even tho

arbitrary or discriminatory, was within at least "the outer perimeter" of his official duties and he is therefore immune from liability.

An order dismissing the cause with prejudice as to all defendants may be submitted, costs to be assessed against plaintiff.

/s/Dan M. Russell, Jr.
United States District Judge

Dated September 29, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-807

JOHN E. ROMEO AND BEVERLY C. ROMEO,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We invite the Court's attention to the following facts, which show that the petition for a writ of certiorari was untimely.

The judgment of the court of appeals was entered on July 7, 1972,[1] and since no petition for rehearing was filed, the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on

[1] A copy of the judgment is included in the certified transcript of record on file in this Court. As petitioners recognize (Pet. 3) the judgment was entered on July 7, 1972. The judgment also states that it was "Issued as Mandate" on July 31, 1972, but under 28 U.S.C. 2101(c) the time for filing a petition for certiorari runs from "the entry of [the] judgment or decree," not its issuance as the mandate.

October 5, 1972. One day later, on October 6, 1972, petitioners filed an application for an extension of time in which to file a petition for a writ of certiorari. By order of October 10, 1972, Mr. Justice Powell extended the time in which to file a petition to December 4, 1972, "without prejudice to the Court's consideration of whether the application has been filed in time." The petition was filed on December 2, 1972.

Under 28 U.S.C. 2101(c), a Justice of this Court "may extend the time for applying for a writ of certiorari for a period not exceeding 60 days." Rule 34(2) of the Rules of this Court provides that "Whenever any justice of this court * * * is empowered by law * * * to extend the time within which a party may petition for a writ of certiorari * * * and application seeking such extension must be presented to the clerk within the period sought to be extended." Petitioners did not comply with this requirement, since their application for an extension was not filed until after "the period sought to be extended" had expired, and they have offered no justification for their failure to do so. Since the application was not timely filed, there has been no valid extension of the 90-day statutory time for petitioning and the petition for certiorari was untimely.

2. In any event, for the reasons given by the court of appeals, on whose opinion we rely, the district court correctly dismissed petitioners' suit. That ruling presents nothing warranting further review.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973